family. I am a certified and public accountant by profession and have been so practising for the past 18 years."

His motion came up before Raja Azlan Shah J. on 12th January, 1970, and on 21st January, 1970, he dismissed the application.

The appellant has appealed to this court.

I am of the opinion that this appeal should be dismissed.

The question here is, was the appellant a moneylender within the meaning of the Ordinance? If he was, then the decision of the official assignee was right. The Privy Council has pronounced on the effect of the presumption under section 3 (which does not exist in the equivalent English legislation) in *Chow Yoong Hong* v. *Choong Fah Rubber Manufactory*.[1] Delivering the advice of their Lordships, Lord Devlin said at page 77:

> The effect of [section 3] has been considered by Thomson J. (as he then was) in *Sadhu Singh* v. *Sellathurai*[2] in a judgment which their Lordships respectfully approve and adopt. To lend money is not the same thing as to carry on the business of money lending. In order to prove that a man is a moneylender within the meaning of the Ordinance, it is necessary to show some degree of system and continuity in his money lending transactions. If he were left to discharge this burden without the aid of any presumption, a defendant might frequently be in a difficulty. He might have had only one or two transactions with the moneylender and he might find it difficult to obtain evidence about the business done by the moneylender with other parties. Section 3 enables a defendant to found his claim on proof of a *single* loan made to him at interest, it being presumed, in the absence of rebutting evidence that there were sufficient other transactions of a similar sort to amount to a carrying on of business."

It will be seen that proof of a *single* loan made to the debtor at interest raised a presumption that there were sufficient other transactions of a similar sort to amount to a carrying on of the business of money lending by the appellant.

Before Raja Azlan Shah J. the appellant gave no evidence and called no witnesses to rebut this presumption. To do that he depended solely on his affidavit. I think that it was for him to satisfy the learned judge that the official assignee was wrong. As he gave no evidence and called no witnesses, the learned judge was right to uphold the official assignee's decision.

Before us Mr. G. Vadiveloo for the appellant argued that it was unnecessary for the appellant to rebut the information contained in the memorandum submitted by the official assignee to the registrar under rule 183 of the Bankruptcy Rules, 1969. That information was to the effect that the appellant had subsequent to the loan to the debtor made the two other loans already mentioned.

Rule 183 reads:

> "The Official Assignee shall, within three days after receiving notice from a creditor of his intention to appeal against a decision rejecting a proof, file such proof with the registrar with a memorandum thereon of his disallowance thereof..."

Mr. Vadiveloo conceded that a copy of the memorandum had been sent to him by letter dated 19th November, 1969 (that is, several days before the hearing of the application). In my view, the onus was on him to rebut the presumption against his client by such evidence as would convince the learned judge. He failed to discharge that onus.

Moreover, apart from the single loan made to the debtor in 1956 there were the two subsequent loans. It is true that one of these was made in 1959 and the other in 1963; but I do not think that they were too remote in point of time from the loan to the debtor to be left out of consideration. They were rightly taken into account when determining the question whether or not the appellant was a moneylender.

With respect the learned judge was right to dismiss the motion.

Azmi L.P. and **Gill F.J.** concurred.

Appeal dismissed.

Solicitors: *D. P. Xavier & Co.*

TUNKU ABDULLAH v. ALI AMBERAN

[F.C. (Azmi L.P., Suffian and Gill F.JJ.) August 14, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. 13 of 1970]

Elections — Election petition — Appeal — Final Order — Whether decision of Election Judge may be appealed against to the Federal Court — Federal Constitution, art. 118.

The appellant sought to appeal from the decision of the Election Judge ([1970] 2 M.L.J. 15) against the finding that he was guilty of corrupt practice and against the award of costs against him.

Held, dismissing the appeal: the final order of an Election Judge is unappealable and therefore the Federal Court had no jurisdiction to entertain the appeal.

Cases referred to:-

(1) *Devan Nair* v. *Yong Kuan Teik* [1967] 1 M.L.J. 261.

(2) *A.J. Arzu* v. *A.E. Arthurs & Anor.* [1965] 1 W.L.R. 675.

(3) *Sennayake* v. *Navaratne* [1954] A.C. 640.

(4) *Re Perting Timor Election* [1962] M.L.J. 333, 334.

The following cases were also cited in argument: *In re Chinery* 12 Q.B.D. 342, 345, 346; *Onslow* v. *Inland Revenue* 25 Q.B.D. 465; *Haslam Foundry* v. *Hall* 20 Q.B.D. 491, 393; *N.P. Ponnuswamy* v. *Returning Officer Namakkal Constituteney* [1952] S.C.R. 218; *Durga Shanker Meta* v. *Reghuraj Singh* [1955] S.C.R. 267; *Kennedy* v. *Purcell* (1888) 59 L.T. 279.

FEDERAL COURT.

Dato Athi Nahappan for the appellant.

O. L. Phipps (*A. Rajadurai* with him) for the respondent.

Ajaib Singh (Senior Federal Counsel) held watching brief on behalf of Election Commission.

Cur. Adv. Vult.

Suffian F.J. (read by Gill F.J.): The question for decision here is whether or not the decision of Raja Azlan Shah J. sitting as an Election Judge nominated by the Chief Justice under section 33(1) of the Election Offences Act, 1954, may be appealed against to this court.

The appellant was the successful Alliance candidate at the last general election for the Parliamentary Constituency of Rawang. The respondent was a voter and active member of an opposing party (Gerakan).

The respondent sought to avoid the election on three grounds. He succeeded in proving only one of these grounds. He succeeded in proving that 2,500 copies of election cards supporting the appellant had been printed on the order of Inche' Kamaruddin bin Buyong, that Inche' Kamaruddin was not the appellant's electoral agent, but he was the secretary of the Alliance Party at Rawang and therefore interested in the appellant winning, that these cards did not bear the names and addresses of their printers and publishers as required by section 11(1)(c) of the Act, that though Inche' Kamaruddin was not an agent in the ordinary sense he was the appellant's agent in the electoral sense, that therefore the appellant was responsible for Inche' Kamaruddin's act and guilty of a corrupt practice within the meaning of the Act.

The learned judge gave judgment to that effect on 9th January, 1970. On the following day, before submitting his report to the Election Commission he heard an application by the appellant for relief under section 28.

The appellant, if he desired the court not to declare his election void and that he be not subject to any disability under the Act, must prove under section 28, and he endeavoured to prove —

(a) that no corrupt practice had been committed by him or his election agent and the offences mentioned in his (the learned judge's) report had been committed contrary to the orders and without the sanction or connivance of the appellant or his election agent;

(b) that the appellant and his election agent had taken all reasonable means for preventing the commission of corrupt practices at the election;

(c) that the offences mentioned in the learned judge's report were of a trivial, unimportant and limited character; and

(d) that in all other respects the election was free from any corrupt practice on the part of the appellant and of his agents.

Having heard Mr. Ajaib Singh, counsel for the Attorney-General, and counsel for the parties concerned, the learned judge on the same day (namely, 10th January, 1970) merely announced that the appellant was to pay the respondent's costs. He did not say whether or not in his opinion the appellant had proved to the court that he was entitled to relief under section 28, and the appellant never knew of the learned judge's conclusion until a few days later when he read in the newspapers that his election had not been declared void.

This was because the learned judge was under the impression that he was not required by the Act to announce his decision to the parties, and that he was required by the Act (sections 36 and 37) to announce his decision direct and in confidence to the Election Commission. The material parts of these two sections read as follows:

"36. At the conclusion of the trial of an election petition the Election Judge shall determine whether the candidate whose return or election is complained of, or any other and what person, was duly returned or elected, or whether the election was void, and shall certify such determination —

(a) to the Election Commission .....:

(b) .....

Upon such certificate being given such determination shall be final; ....."

"37.(1) At the conclusion of the trial of an election petition the Election Judge shall also report in writing —

(a) to the Election Commission .....:

(b) .....

(i) whether any corrupt .. practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at the election, or by his agent, and the nature of such corrupt .. practice, if any; and

(ii) the names and descriptions of all persons if any, who have been proved at the trial to have been guilty of any corrupt .. practice.

(2) .....

(3) .....

(4) The Election Commission ..... shall cause a copy of such report to be published in the *Gazette*, ..."

The learned judge reported direct and in confidence to the Election Commission who caused the report to be published in the *Federal Gazette* of 12th February, 1970 — see P.U. (B) 51. It is obvious from that report that the appellant had satisfied the learned judge as to the things that must be satisfied under section 28, for the learned judge declared the election valid and that the appellant had been duly elected.

The appellant appeals to this court against the finding that he was guilty of corrupt practice and against the award of costs against him.

Mr. Phipps for the respondent has a preliminary objection. He says that there is no appeal against the final decision of the learned judge and cites three cases: *Devan Nair* v. *Yong Kuan Teik*,[1] *A. J. Arzu* v. *A. E. Arthurs and Another*[2] and *Senanayake* v. *Navaratne*.[3]

The gist of Mr. Phipps' argument is this, that the learned judge was sitting as a special tribunal, not as a judge of the High Court, that under section 36 his determination is final and cannot be appealed against, and that section 67 of the Courts of Judicature Act, 1967 (which says that a judgment of the High Court in a civil matter may be appealed to the Federal Court) does not apply as the judgment in the instant case is not a judgment of a High Court.

Dato' Nahappan on the other hand contends that the Federal Court has jurisdiction to entertain this appeal because —

(1) under section 36 what is final is the determination certified by the learned judge to the Election Commission (that the election was valid and that the appellant had been duly returned); Dato' Nahappan says that he does not contest that determination and that what he contests is the finding leading to that determination, namely, the finding that the appellant was guilty of corrupt practice;

(2) section 33(1) (which provides that every election petition shall be tried by the Chief Justice or by

a Judge of the High Court nominated by the Chief Justice for the purpose), if it creates an Election Judge, is contrary to Article 118 of the Malaysian Constitution which provides "no election to the House of Representatives... shall be called in question except by an election petition presented to the *High Court* having jurisdiction where the election was held." It is submitted that Article 118 overrides all the provisions in the Election Offences Act relating to Election Judges. Dato' Nahappan does not say that the learned judge had no jurisdiction to determine this election petition. All he says is that in view of Article 118 the learned judge must be deemed to have been sitting as an ordinary judge of the High Court, and from his judgment an appeal lies under section 67 of the Courts of Judicature Act. Dato' Nahappan points out that Article 118 was not brought to the notice of the Federation Court of Appeal in *Re Perting Timor Election*[4] or to the notice of the Privy Council in the *Devan Nair* case[1] where it was held that there is no appeal from the decision of an Election Judge; and

(3) the Indian Constitution dealing with election petitions expressly creates a special tribunal and it is not disputed that in India therefore there is no appeal against the decision of an Election Judge.

I am of the opinion that this court has no jurisdiction to entertain this appeal. As to Dato' Nahappan's second and third arguments, the Privy Council has emphatically held in *Devan Nair*[1] that a final order (which I consider the order appealed against is) is unappealable. Lord Upjohn explained the historical reason for this as follows at page 262:

"Constitutionally decisions on questions of contested elections are vested in the Assembly for which the contested election has been held, but in the course of the nineteenth century many countries, including this country and many of Her Majesty's possessions overseas, adopted the view that, as the deliberations of the Assembly itself were apt to be governed rather by political considerations than the justice of the case, it was right and proper that such questions should be entrusted to the courts. This required legislation in every case, and in many cases the right of appeal after the hearing of an election petition by an election tribunal to which those hearings were entrusted was severely limited clearly for the reason that it was essential that such matters should be determined as quickly as possible, so that the Assembly itself and the electors of the representatives thereto should know their rights at the earliest possible moment."

It does not appear that article 118 was brought to the attention of their Lordships in that case. But in the earlier case *Arzu*[2] their Lordships had to consider the effect of the relevant statutory provisions governing election petitions in British Honduras which are as follows:

"'Local Government (District Boards) Ordinance, c. 136: ... 12. The Governor in Council may make regulations to provide for the registration of voters and the conduct of elections of members of a board.'

Pursuant to such provision there were made: 'Local Government (District Boards) (Registration of Voters and Elections) Regulations, 1963. ... 59. A petition complaining of an undue election of any member or members of a Board (hereinafter called 'an election petition') may be presented to the Supreme Court within ten days after such return or election ... 62(1). Every election petition shall be tried by a *Judge of the Supreme Court* sitting alone without a jury, in open court. (2) At the conclusion of the trial, the judge shall determine whether the member whose election or return is complained of or any other and what person was duly returned or elected, or whether the election was void, and shall certify such determination to the Governor; and upon such certificate being given, such determination shall be final; and the return shall be confirmed or altered or a new election shall be held, as the case may require, in accordance with such certificate. 63. At the trial of an election petition, the procedure shall, as near as circumstances will permit be the same, and the judge shall have the same powers, jurisdiction and authority as if he were trying a civil action without a jury; and witnesses shall be subpoenaed and sworn in the same manner, as near as circumstances will permit, as in the trial of a civil action in the Supreme Court, and shall be subject to the same penalties for perjury'."

Regulation 62(1) of the British Honduras legislation expressly provides that an election petition shall be tried by a *Judge of the Supreme Court*, and yet their Lordships of the Privy Council did not hesitate to give effect to paragraph (2) of regulation 62 which provides that the judge should determine the matter referred to him, certify his determination to the Government and that upon such certificate being given his determination shall be final.

In my judgment there is no inconsistency between our Election Offences Act and Article 118 of the Constitution, for article 118 does not guarantee the citizen the right of appealing against the decision of a High Court Judge, and it is therefore open to Parliament to provide (by law) which decisions of a High Court may be appealed against and which not. By section 36 of the Election Offences Act, Parliament has clearly provided that the determination of a judge hearing an election petition shall be final. When Parliament enacted section 67 of the Courts of Judicature Act it knew of the court's reluctance to accept jurisdiction in a case concerning the election of a member of the legislature and that the court will not entertain an appeal such as the one under consideration. If Parliament had intended to change this law, surely it would have written section 67 of the Courts of Judicature Act in such a way as to make it clear beyond doubt that the Federal Court has jurisdiction to hear appeals from the judgment of the High Court not only in any civil matter but also in election petitions. It did not do so and I am convinced that the reason for that is that Parliament did not intend to change the law to render the decisions of an Election Judge appealable.

As to Dato' Nahappan's first argument, I agree that, as he says, section 36 requires the Election Judge to determine one of three things, namely —

(i) whether the candidate whose return or election is complained of, or any other and what person, was duly returned; or

(ii) whether the candidate, or any other and what person, was duly elected; or

(iii) whether the election was void.

But I do not agree that it is only that determination that is final, and that findings leading to that determination may be appealed against.

As was pointed out by us during the course of argument, the determination of the learned judge that the election was not void and that the appellant had been duly elected is like the top part of a building and

that his findings leading to that determination are like the pillars of the building. We cannot allow the pillars to be attacked, because if the pillars collapse the whole building will collapse also. Besides, the findings complained of were incorporated in the learned judge's determination certified to the Election Commission, they were part of his determination and no such part may be impugned in the Federal Court.

I would therefore dismiss this appeal with costs.

Azmi L.P. and **Gill F.J.** concurred.

Appeal dismissed.

Solicitors: *Athinahappan & Co.; Joginder & Rajadurai.*

TAN AH SAM v. CHARTERED BANK

[F.C. (Azmi L.P., Suffian and Gill F.JJ.) August 14, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. 14 of 1970]

Banks & Banking — Cheque paid in for collection — Whether banker receiving cheque a holder in due course — Duty of bank — Whether words "refer to drawer" libellous — Bills of Exchange Ordinance, 1949, ss. 80 and 82C.

Defamation — Banker and customer — Whether words "refer to drawer" libellous.

The plaintiff was a fruit supply contractor. He opened a current account with the defendant bank on the November 7, 1968 and on November 8, 1968 he paid in a cheque for $1,306.71 drawn in favour of a partnership firm, of which the plaintiff was a partner. The cheque was subsequently returned by the bank to the plaintiff. In the meantime the plaintiff had issued several cheques which were dishonoured as there was no sufficient and available funds to meet them. These cheques were returned to the drawer with the note "refer to drawer". The plaintiff brought an action for damages against the defendant bank for wrongfully and in breach of their agreement dishonouring the cheques drawn by him; and further and in the alternative for falsely and maliciously writing on the cheques "refer to drawer" and publishing the same to the drawee.

Held by Abdul Hamid J. in the High Court: (1) the defendants received the cheque paid in as agents for collection and were not holders in due course of the cheque;

(2) in the circumstances of this case the defendants had good reasons to scrutinize carefully before deciding whether or not to accept the cheque and there was no evidence to show that they acted otherwise than in conformity with banking practice when they returned the cheque to the plaintiff;

(3) in this case there was no agreement express or implied that the plaintiff was permitted to draw before the cheque was cleared and when the plaintiff issued the cheques, there was clearly no sufficient and available funds to meet them and the defendants were justified in dishonouring them;

(4) on the evidence, the words "refer to drawer" by themselves were not libellous. The defendants were justified when compelled to dishonour the cheques to return them with a note to the drawee that he should refer to the drawer.

The appeal against the decision of Abdul Hamid J. was dismissed by the Federal Court.

Cases referred to:-

(1) *Underwood* v. *Bank of Liverpool* [1924] 1 K.B. 775, 804.

(2) *Re Farrows Bank Ltd.* [1923] 1 Ch. 41.

(3) *Westminister Bank Ltd.* v. *Zang* [1966] 1 All E.R. 114.

(4) *Bevan* v. *National Bank Ltd; Bevan* v. *Capital and Countries Bank Ltd.* 23 T.L.R. 65.

(5) *Ex parte the Darlington District Joint Stock Banking Co.* 45 E.R. 1044.

(6) *Flach* v. *London and South Western Bank* 31 T.L.R. 334.

The following cases were also cited in argument in the Federal Court: *Banbury* v. *Bank of Montreal* [1918] A.C. 626, 658, 661; *Yong Mok Hin* v. *United Malay States Sugar Industries Ltd.* [1967] 2 M.L.J. 9, 16, 17; *Siow Wong Fatt* v. *Sugar Rotan Mining Ltd. & Anor.* [1967] 2 M.L.J. 120, 121; *Nasib Singh* v. *Ramasamy* [1969] 1 M.L.J. 211; *Backhouse* v. *Charlton* [1878] 8 Ch. D. 444; *Chua Kim Liang* v. *Teo Kim Ngo* [1963] M.L.J. 261; *Lim Chui Lai* v. *Zeno Ltd.* [1964] M.L.J. 314, 315; *Blay* v. *Pollard* [1930] 1 K.B. 628, 634; *L.P.T.B.* v. *Moscrop* [1942] A.C. 332, 347, H.L.; *Qualcast* v. *Haynes* [1959] 2 All E.R. 38, 44D, 44E, H.L.; *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1956] A.C. 218, 241, 243, 239; *Akrokerri Mines Ltd.* v. *Economic Bank* [1904] 2 K.B. 465, 468, 470; *London Joint Stock Bank* v. *Simmons* [1892] A.C. 201, 221; *In re Riches* (1865) 46 E.R. 1044.

FEDERAL COURT.

M. Abraham for the appellant.

P. J. Mooney for the respondent.

In the High Court *Kok Wee Kiat* appeared for the plaintiff and *Alex Lee* for the defendants. On February 23, 1970 the following judgment was delivered:

Abdul Hamid J.: The plaintiff, a businessman, is claiming damages against the defendants for wrongfully and in breach of their agreement dishonouring certain cheques drawn by him; further and in the alternative the plaintiff is alleging that the defendants falsely and maliciously wrote on the aforesaid cheques of and concerning the plaintiffs "refer to drawer" and published the same to the drawee.

The defendants are bankers carrying on business at Kuala Lumpur.

The plaintiff is a fruit supply contractor of the officers' mess of the Federation Army. He also deals with fish, vegetables and other provision. On November 7, 1968, he opened a current account with the defendant bank at Kuala Lumpur. On November 8, 1968, he paid in a cheque for $1,306.71, drawn in favour of Robert Brothers Trading, a company in which the plaintiff is one of the two partners. It was a crossed cheque and the words "or bearer" had not been crossed out. The cheque was endorsed by his brother and chopped with the partnership chop.

On November 11, 1968, the plaintiff issued 6 cheques, 3 of which were cheque Nos. PA 510204 (P. 3), PA 510208 (P. 4), and PA 510209 (P. 5). These cheques were dishonoured as there was no sufficient and available fund to meet them. These cheques were returned to drawee with a note "refer to drawer."

On November 13, 1968, the plaintiff went to defendant bank to pay in some money. While he was there, a member of the staff told him that his account would be closed. The plaintiff showed the paying-in slip for the sum of $1,306.71 (P. 1B). After some time this man produced the cheque and showed it to him. He was, however, told that the cheque could not be used and it would be returned to him by post. On November 15, 1968, he received P. 2 by post together with a covering letter (P. 11). On receipt of P. 2, he